Supreme Court, U.S.
FILED
DEC 23 1998
OFFICE OF THE CLERK

No. 98-830

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

AMOCO PRODUCTION COMPANY,
on behalf of itself and the class it represents,
Petitioners,

v.

SOUTHERN UTE INDIAN TBIBE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF ROYALTY OWNERS, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

DONALD F. HEATH, JR.*
ROBIN STEAD
STEAD & HEATH, P.C.
100 N. Broadway Ave., Suite 2270
Oklahoma City, Oklahoma 73102
(405) 232-1148
Attorneys for the National Association of Royalty Owners, Inc., *amicus curiae*

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	9
I. OWNERSHIP OF CBM IS AN ISSUE OF NATIONAL IMPORTANCE	9
II. THE TENTH CIRCUIT COMMITTED FUNDAMENTAL ERROR IN INTERPRETING PUBLIC LAND ACTS	11
III. THE TENTH CIRCUIT VIOLATED *CHEVRON* BY REFUSING TO RELY ON INTERIOR'S RULES AND REGULATIONS	17
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

	Page
Aulston v. United States, 915 F.2d 584 (10th Cir. 1990)	18, 19
Brennan v. Udall, 379 F.2d 803 (10th Cir. 1967)	18, 19
Brown v. Spillman, 155 U.S. 665 (1895)	11
Carbon County v. Union Reserve Coal Co., 898 P.2d 680 (Mont. 1995)	2, 14, 15
Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210 (1932)	11-12
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	9, 17, 19
Leo Sheep Co. v. United States, 440 U.S. 668 (1979)	10
Louisiana ex rel. Guste v. U.S., 832 F.2d 935 (5th Cir. 1987)	12
NCNB Texas National Bank v. West, 631 So.2d 212 (Ala. 1993)	2, 13-14, 15
Skidmore v. Swift & Co., 323 U.S. 134 (1944)	17
Southern Ute Indian Tribe v. Amoco Production Co., 119 F.3d 816 (10th Cir. 1997)	9, 15
Southern Ute Indian Tribe v. Amoco Production Co., 151 F.3d 1251 (10th Cir. 1998)	2, 6, 11, 15
Southern Ute Indian Tribe v. Amoco Production Co., 874 F.Supp. 1151 (D.Colo. 1995)	5, 8-9
Trent v. Energy Dev. Corp., 902 F.2d 1143 (4th Cir. 1990)	12
United States Steel Corp. v. Hoge, 468 A.2d 1380 (Pa. 1983)	2, 13, 15
United States v. Union Pacific Railroad Co., 353 U.S. 112 (1957)	10, 17, 18, 19
Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983)	10, 18, 20

STATUTES

Coal Land Acts, 30 U.S.C. §§ 81, 83-85	3, 18
Enzi Act, P.L. No. 105-367, § 1(a), 112 Stat. 3313 (1998)	3, 10

TABLE OF AUTHORITIES—Continued

FEDERAL REGULATIONS

	Page
30 C.F.R. § 206.171	19
43 C.F.R. § 3000.0-5(b)	19
43 C.F.R. § 3400, et seq., Coal Management	19
43 C.F.R. § 3500, et seq., Management of Solid Minerals Other Than Coal	19
43 C.F.R. § 3100, et seq., Oil and Gas Leasing	19

ADMINISTRATIVE DECISIONS

Amoco Production Co., GS-181-O&G (U.S.G.S. July 22, 1981)	18
Ownership of and Right to Extract Coalbed Gas in Federal Coal Depoosits, 88 Interior Dec. 538 (1981)	8

OTHER AUTHORITIES

Tom R. Mason, *Discussion Notes*, 127 Oil and Gas Reporter 249-250 (1996)	14
Andrew W. Scott et al., *Thermogenic and Secondary Biogenic Gases, San Juan Basin, Colorado and New Mexico—Implications for Coalbed Gas Productibility*, 78 Am. Assoc. Petroleum Geologists Bull. 1186 (1994)	5-6
Eugene Kuntz, *A Treatise on the Law of Oil and Gas* (1987)	11, 12
Howard R. Williams and Charles J. Meyers, *Oil and Gas Law, Manual of Oil and Gas Terms* (1987)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-830

AMOCO PRODUCTION COMPANY,
on behalf of itself and the class it represents,
Petitioners,

v.

SOUTHERN UTE INDIAN TBIBE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF ROYALTY OWNERS, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The National Association of Royalty Owners, Inc. (NARO) hereby submits this Brief of Amicus Curiae in Support of the Petition for Certiorari filed herein by Amoco Production Company.[1] The Petitioner, Amoco Production Company, and the Respondent, Southern Ute Indian Tribe, have consented in writing to the filing of this brief by NARO.

INTEREST OF AMICUS CURIAE

Who owns the right to explore for and produce coalbed methane gas (CBM): the owner of the gas estate or the

---

[1] Pursuant to Supreme Court Rule 37.6, the undersigned amicus curiae advise the Court that the Land Owners Coalseam Committee, an association of several hundred royalty owner defendants, made a financial contribution to the preparation of this Brief.

owners of the coal estate? That is the central question on this appeal and it is of national importance. CBM represents more than 5% of the nation's proved gas reserves and nearly 15% of potential reserves. Only three state supreme courts have considered the issue and they have reached different results.[2]

The Tenth Circuit decided the issue without applying principles of real property or oil and gas law. The rule of law that emerges from the Tenth Circuit opinion is that the government always wins.

> In fact, we have found no occasion in which a reservation of a mineral asset to the United States has been treated narrowly to exclude a newly appreciated value with that mineral. . . . Given the established principle that all doubts respecting land grants and mineral reservations are construed in favor of the government [citation omitted], we conclude that coal reserved to the United States in the 1909 and 1910 Acts includes the adsorbed CBM.

Southern Ute Indian Tribe v. Amoco Production Co., 151 F.3d 1251, 1266 (10th Cir. 1998). Under this specious logic, the Tenth Circuit would have reached the opposite result and concluded that CBM was part of the gas estate if the patents had reserved gas instead of coal.

A question of such national importance must be founded on higher principles. The Tenth Circuit's opinion determines ownership of CBM rights in 200,000 acres in which the respondent owns coal rights and will be precedent for ownership of CBM rights in 20.4 million acres in the states of Montana, North Dakota, Wyoming, Colorado,

---

[2] *Carbon County v. Union Reserve Coal Co.*, 898 P.2d 680 (Mont. 1995), holding that CBM is not part of the coal estate; *NCNB Texas National Bank v. West*, 631 So.2d 212 (Ala. 1993), holding that gas owners are entiled to produce CBM that escapes from the coal seam and coal owners are entitled to produce CBM that remains in the coal; and *United States Steel Corp. v. Hoge*, 468 A.2d 1380 (Pa. 1983), finding that CBM was considered a waste product at the time the deed was executed and would not have been retained under a reservation of oil and gas rights.

New Mexico and Utah that were patented under the same acts.

Within three months after the Tenth Circuit issued its opinion, Congress passed the Enzi Act, P.L.No. 105-367, § 1(a) & (b)(3), 112 Stat. 3313 (1998), to afford limited relief to owners of existing leases on lands in which the United States still owed the coal rights.

The National Association of Royalty Owners, Inc. (NARO) files this Brief in support of Amoco's petition for certorari and on behalf of an estimated 200,000 to 500,000 royalty owners who will be affected by the Tenth Circuit's opinion. According to NARO estimates, 65% of royalty owners are women. The average age is 65. The typical royalty owner acquired her mineral interest by inheritance from her ancestors who homesteaded the property. The average mineral owner receives $200 per month in royalty income and uses it to supplement Social Security and pension benefits. The freefall in oil prices in 1998 has sharply reduced the income of most mineral owners. The Tenth Circuit's opinion, if it stands, will deprive several hundred thousand mineral owners of gas royalties from the sale of CBM.

NARO is a non-profit organization consisting of approximately 5,000 owners of oil and gas royalty interests located in every state in which natural gas is produced. Its purposes are to educate mineral owners and promote their interests through state and federal legislation and appellate court decisions.

STATEMENT OF THE CASE

The Tenth Circuit's opinion fails to consider or discuss the facts of this case. The facts are as follows:

This appeal covers 200,000 acres in LaPlata County, Colorado, that were patented to homesteaders under the 1909 and 1910 Coal Land Acts, 30 U.S.C. §§ 81, 83-85. A typical patent under the 1909 Act contained the following words of grant:

> NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, and in conformity with the several Acts of Congress in such case made and provided, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said claimant and to the heirs of the said claimant the Tract above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever.

Tribe's App. at 603. The same patent contained the following words of reservation of coal:

> reserving, also, to the United States, all coal in the lands so granted, and to it, or persons authorized by it, the right to prospect for, mine, and remove coal from the same upon compliance with the conditions of and subject to the limitations of the Act of March 3, 1909, entitled "An Act for the protection of the surface rights of entrymen."

Tribe's App. at 603.

A typical patent under the 1910 Act contained a similar grant and the following reservation of coal.

> reserving, also to the United States all coal in the lands so granted, and to it, or persons authorized by it, the right to prospect for, mine and remove coal from the same upon compliance with the conditions of and subject to the limitations of the Act of June 22, 1910 (36 Stat. 583).

Tribe's App. at 609.

The parties agree that these patents and the underlying Acts reserved coal to the United States and conveyed the surface and all other minerals, including oil and gas, to the homesteaders.

The United States created the Southern Ute reservation in LaPlata County in 1938 and conveyed equitable title

to the Southern Ute Indian Tribe in 450,000 acres in which no homestead had been estabilshed and 200,000 acres in which the United States had reserved coal rights through patents similar to those quoted above. The United States as Trustee for the Tribe thus owns all surface and mineral rights in 450,000 acres and coal rights in 200,000 acres. The Tribe's ownership is in a checkerboard pattern: it has equitable title to fee lands adjacent to and intermixed with lands where it has equitable title only to coal rights.

All coal discovered in LaPlata County is located in the Fruitland Coal Formation, which is found primarily at depths of 2,500 to 4,000 feet. Coal at these depths is too expensive to mine commercially. Coal is mined only at the outcrops, or where the Fruitland Coal Formation comes to the surface. Only one small coal mine is presently operating in LaPlata County.

Coalbed methane gas (CBM) is a form of natural gas. Methane is the primary constituent of all natural gases, including CBM. CBM is chemically indistinguishable from natural gas. It is produced in LaPlata County through conventional gas wells and processed in gas plants. It is delivered into gas pipelines where it is mixed with and transported with natural gas from other formations where it is resold to consumers of natural gas.

CBM is called coalbed gas because at some point it is contained in coalbed formations. As the trial court noted, "present day scientists who are experts in this field disagree whether CBM is part of coal." *Southern Ute Indian Tribe v. Amoco Production Co.*, 874 F.Supp. 1151, 1154 (D.Colo. 1995). Based on data collected from 750 wells, a recent study finds that only 25% of the gas in the Fruitland Coal Formation was generated "in situ" or through the coalification process. Andrew W. Scott et al., *Thermogenic and Secondary Biogenic Gases, San Juan Basin, Colorado and New Mexico—Implications for Coalbed Gas Producibility*, 78 Am. Assoc. Petroleum Geologists Bull. 1186 (1994). Up to 75% of the CBM was either gener-

ated by bacteria after the coalification process was completed or migrated as free gas in groundwater before being resorbed in the Fruitland Coal Formation.

CBM and other methane gases have a weak physical attraction to all reservoir rock, including coal and sandstones. This physical attraction is called adsorption.[3] The dissent in the Tenth Circuit opinion noted that this weak force is also known as van der Waal's forces. According to the Tribe's expert, van der Waal's forces occur "between most any pair of substances." The deposition of the Tribe's expert compared the adsorption of CBM to coal as similar to a paper's attraction to the table:

> Q. If I put this paper on the table, is the bottom page bound to the table by van der Waals forces?
>
> A. To a certain degree, yes.
>
> Q. Is it part of the table?
>
> A. No, it is not.

151 F.3d at 1271. CBM and other methane gases can exist freely in the cracks or fractures within the coal seam or dissolved in water contained in these fractures. Most CBM is contained in pore spaces of coal; high presure causes most the methane gas to be adsorbed to the coal. The coal reservoir, like any other natural gas reservoir, acts as a container for the methane gas. It is possible for methane gas in the Fruitland Coal to migrate naturally to sandstone formations in the Fruitland Coal or to other subsurface locations of lesser pressure. When a gas well is drilled into the reservoir, methane gas will migrate to the wellbore, where it is captured and reduced to possession by the operator. The CBM in the Fruitland Coal Formation cannot be reduced to possession by traditional coal mining; within 24 hours after the coal and the fracture system is exposed to the atmosphere, the methane gas

[3] Adsorption is the weak physical attraction by which gas or liquid clings to the surface of a solid, such as water being absorbed by a sponge.

escapes. The only way to capture gas contained in the Fruitland Coal is to drill a gas well.

The Southern Ute Indian Reservation is located on the north edge of the Greater San Juan Basin Gas Field, which is a major natural gas field in northern New Mexico and southern Colorado. The Reservation lies in that part of the Field known as the Ignacio Blanco Gas Field. According to a report prepared by the Tribe's geologist, Tribe's App. 1884-1923, natural gas was first discovered and produced in the Ignacio Blanco Gas Field in 1950. Five primary reservoirs, including the coal beds in the Fruitland Formation, have supplied virtually all the gas production from this Field. Natural gas was discovered in 1951 on the Ignacio Anticline[4] from the coals of the Fruitland Coal Formation. Most of the natural gas in this Field was produced from formations deeper than the Fruitland Coal Formation, but between 1951 and 1970, 28.5 billion cubic feet (Bcf) of natural gas were produced from 52 completed wells in the Fruitland Coal Formation on the Ignacio Anticline.

The Fruitland Coal wells started having water problems in 1956-57. All Fruitland Coal wells were abandoned by 1976 because the high water content made the wells uneconomical to produce.

Amoco revitalized drilling in the Fruitland Coal in 1981. Amoco determined that continued pumping of water would "dewater" the fracture systems and permit economic quantities of gas to flow to gas wells. According to the Tribe's geologist, Amoco completed four wells in the Fruitland Coal by using sucker-rod pumps (oil field pumps) to remove formation water in the coal seam,

[4] Ignacio is a town in southeast LaPlata County. An anticline is a subsurface, geological structure in the shape of an upside down bowl, that is, the formation rises to a rounded peak. Anticlinal structures in sedimentary rocks are good prospects for drilling, since any oil and gas in the deposit will normally rise to the highest point in the structure. Williams and Meyers, *Oil and Law, Manual of Oil and Gas Terms* (1987).

reducing the hydrostatic head and releasing the adsorbed methane from the coal reservoir. By 1981, nearly 20,000 wells in the San Juan Basin had been drilled through the Fruitland Formation for deeper production; operators dismissed the potential of the coalbed methane because of the high water content.

Amoco's discoveries coincided with the issuance of an opinion issued on May 12, 1981, by the Solicitor, attached as Appendix F to Amoco's petition for certiorari. The Solicitor's Opinion concluded that the owners of gas rights owned the right to explore for and produce CBM on federal lands. In effect, the United States through its Solicitor disclaimed title to gas produced from coal owned by the United States. A drilling boom ensued. Four hundred sixty successful wells were drilled and producing from the Fruitland Formation when the report of the Tribe's geologist was prepared in 1992.

Amoco and other operators produced CBM under oil and gas leases granted by the homesteaders' successors in interest and from the United States as trustee for the Tribe on lands in which the Tribe was the beneficial owner of surface and oil and gas rights.

The Southern Ute Indian Tribe filed this action in the District Court of Colorado in 1991, alleging that its coal rights on 200,000 acres entitled it to all coalbed methane gas produced from the Fruitland Coal Formation. The Tribe sued all gas producers and gas owners in the 200,000 acres where the Tribe owned only the coal rights. The district court certified a class of nonfederal defendants consisting of the working interest and royalty owners; Amoco was named as class representative.

On cross motions for summary judgment, the trial court found that the 1909 and 1910 Coal Land Acts were unambiguous and ruled that the plain meaning of coal did not include gas produced from coal reservoirs. 874 F. Supp. at 1151-1152. The trial court also ruled that the Solicitor's 1981 Opinion on the ownership of CBM rights

was entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). 874 F.Supp. at 1159-1160.

The Tenth Circuit reversed, findings that the Acts were ambiguous and that ambiguity or uncertainty in the terms employed in land grants are to be construed in favor of the government. *Southern Ute Indiian Tribe v. Amoco Production Co.*, 119 F.3d 816, 821 (10th Cir. 1997). The Tenth Circuit also held that the Solicitor's Opinion was not entitled to *Chevron* deference. The Tenth Circuit *en banc* held that the Acts were ambiguous as to whether Congress intended to reserve CBM and ruled that ambiguities in land grants must be construed in favor of the sovereign. *Southern Ute Indian Tribe v. Amoco Production Co.*, 151 F.3d 1251, 1267 (10th Cir. 1998). From this ruling, Amoco filed its petition for certiorari with this Court.

REASONS FOR GRANTING THE PETITION

Amoco has sought certiorari on the following grounds:

1. Ownership of CBM is an issue of national importance that must be resolved now to avoid major industry disruption and promote stability in land titles;
2. The Tenth Circuit committed fundamental error in interpreting major public lands statutes; and
3. This Court should resolve a split in the Circuit Courts of Appeal on *Chevron* deference.

I. OWNERSHIP OF CBM IS AN ISSUE OF NATIONAL IMPORTANCE

In interpreting reservations under public land acts, this Court has granted certiorari in at least three cases on the grounds that they were of national importance:

1. *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 42 (1983): "In view of the importance of this case to the administration of more than 33 million acres of land patented under the [Stock-Raising

Homestead Act of 1916], we granted certiorari." The issue was who owned gravel rights under this land act.

2. *Leo Sheep Co. v. United States*, 440 U.S. 668, 677 (1979): "Because this holding affects property rights in 150 million acres of land in the Western United States, we granted certiorari." The issue was whether the United States reserved an implied easement in lands granted to the railroad under the Union Pacific Act of 1862.

3. *United States v. Union Pacific Railroad Co.*, 353 U.S. 112, 113 (1957): "The case is here on a petition for a writ of certiorari which we granted in view of the public importance of the question presented." The issue was whether railroads owned mineral rights under lands granted to them under an 1862 act.

This appeal raises questions of equal or greater national importance. The Tenth Circuit's opinion determines ownership of CBM rights in 200,000 acres in which the respondent Tribe owns beneficial coal rights. The trial court estimated the value of the CBM on these lands at $200,000,000. The Tenth Circuit's opinion also will be precedent for ownership of CBM rights in 20.4 million acres in the states of Montana, North Dakota, Wyoming, Colorado, New Mexico and Utah that were patented under the same Coal Land Acts of 1909 and 1910.

In a year in which Washington was stalemated by the investigation into the Chief Executive, Congress acted within three months after the Tenth Circuit issued its opinion and passed the Enzi Act to afford limited relief to owners of existing leases on lands in which the United States still owned the coal rights.

CBM represents more than 5% of the nation's proved gas reserves and nearly 15% of potential reserves. The ownership of this important resource should be decided by the Nation's highest Court.

II. THE TENTH CIRCUIT COMMITTED FUNDAMENTAL ERROR IN INTERPRETING PUBLIC LAND ACTS

The Tenth Circuit committed fundamental error in determining the ownership of CBM:

> We are concerned not with the physical state of the substance as gas at the surface as it is now produced by modern technology, but rather with its physical state prior to extraction, as trapped in coal and economically inseverable in 1909.

151 F.3d at 1260-1261. In limiting its inquiry to the physical state of coal in the ground and the scientific knowledge available in 1909, the Tenth Circuit ignored the law of capture and correlative rights, bedrock principles of the common law that are recognized in all oil-and-gas jurisdictions.

The law of capture is based on the common law of wild animals. Oil and gas, like wild animals, are migratory. If a wild animal is resting on or roaming across a tract, the landowner cannot claim ownership of the wild animal until he traps the animal or otherwise reduces it to possession. Courts have treated oil and gas the same way, calling them minerals *ferae naturae*. Oil and gas is formed over millions of years and can naturally migrate hundreds of miles from its point of origin. In its modern subsurface locations, oil and gas can lie in formations or pools that extend across several miles. The landowner cannot claim ownership of the oil and gas merely because it underlies his land. He must drill a well and reduce it to possession at the surface before he can claim it as his own.

This rule, known as the law of capture, has been adopted in all oil-and-gas jurisdictions,[5] including the federal government. *Brown v. Spillman*, 155 U.S. 665, 669-670 (1895); *Champlin Ref. Co. v. Corporation Comm'n*, 286

[5] See authorities collected at Eugene Kuntz, *A Treatise on the Law of Oil and Gas* (1987) § 4.2.

U.S. 210, 233 (1932). A leading commentator has defined the law of capture as follows:

> According to the law of capture, in general terms, the landowner may capture oil or gas by operations on his land. He owns the substance absolutely once it has been reduced to dominion and control. Before the instant of control, however, the ownership of the substance or the right to capture and control it is subject to the possibility of capture and control by another acting within his own rights as a landowner and producing from a common source of supply. The owner of the drained tract has no legal remedy but may protect his right in the oil and gas by drilling on his own tract.

Kuntz, § 4.1. The law of capture applies to gas produced from coal reservoirs, *Trent v. Energy Dev. Corp.*, 902 F.2d 1143 (4th Cir. 1990), and to gas produced from other reservoirs, *Louisiana ex rel. Guste v. U.S.*, 832 F.2d 935, 938 (5th Cir. 1987). Based on the law of capture, gas is defined under federal regulations at the point where it is taken into possession or captured: at the well under atmospheric conditions. 43 C.F.R. § 3000.0-5(b).

The related common-law principle of correlative rights requires mineral owners to exercise due regard for the rights of other owners in extracting the minerals. Correlative rights, which have been recognized in all oil-and-gas jurisdictions, refer to all of the rights and duties that exist between landowners with regard to operations in a common source of supply. Kuntz, § 4.3.

The Tenth Circuit prematurely ended its inquiry. It concluded that CBM is owned by the coal owners because it can be adsorbed to coal while buried in the subsurface. Ownership of minerals in the subsurface formation is not dispositive. The Tenth Circuit recognized that CBM is gas at the surface as it is produced and reduced to possession by Amoco. The Tenth Circuit should have considered whether Amoco observed the correlative rights of the coal owners in drilling and completing its gas wells and producing the CBM.

Three state supreme courts have considered ownership of CBM; they properly focused the inquiry on correlative rights.[6]

In *Hoge*, CBM was produced as a by-product of mining operations. The value of the CBM was 1% of the BTU value of the coal. CBM is poisonous and must be vented or otherwise produced during coal mining operations. The Pennsylvania Supreme Court held that the coal owner may retain any CBM contained in coal that is brought to the surface and produced during coal mining operations so long as he observes the correlative rights of the owners of the gas estate:

> Hence, the coal owner may mine the coal and extract the gas from it, or both. If he chooses to extract the gas, drilling as well as hydrofracturing are available means, so long as their utilization does not impinge upon the rights of owners of the surrounding property, since the damage to coal inflicted by these processes is within his dominion to inflict.

468 A.2d at 1388. The Pennsylvania court recognized that CBM is migratory and that "the landowner, of course, has title to the property surrounding the coal, and owns such of the coalbed gas as migrates into the surrounding property." 468 A.2d at 1388.

NCNB also considered whether coal miners could retain CBM that was produced as a by-product of coal-mining operations. The field produced only 30 Mcf of methane per day [$60.00 per day at today's prices]. The Alabama Supreme Court found that because of the migratory nature of oil and gas, ownership of a mineral resource "requires actual possession to establish ownership of the resource." 631 So.2d at 223. Coal miners are entitled to keep CBM on the following conditions:

---

[6] Without agreeing or disagreeing with the results in the CBM cases decided by the three state supreme courts, NARO endorses each state court's application of the law of capture and correlative rights.

> This bundle of property rights [for the coal owner] includes the right to reduce to possesion any gas trapped within the coal itself, so long as that gas remains within the coal until the time of its capture. However, as shown below, due to the migratory nature of natural gas, the coal owner would lose any right to possess coalbed methane gas once that gas migrates out of his property and thus beyond the right to reduce the gas to possession.

631 So.2d at 223-224. Even gas contained within coal at the beginning of the production process belongs to the gas owner if the gas migrates to another formation during the mining process. Gas owners were exclusively entitled to produce gas from "gob" wells in strata above the coal seams to which the gas migrated after the coal was mined. The discussion notes to Oil and Gas Reporter at 127 OGR 249-250 concluded that the NCNB decision was a victory for the gas owners: 70% of the gas produced came from gob wells.

In *Carbon County*, a gas producer sought to drill a gas well to produce CBM, but the coal owner sought an injunction and to quiet title in the CBM. The Montana Supreme Court held that the coal owners "may extract and capture coal seam methane gas for safety purposes during the mining process as such an incidental mining right, [but] the existence of that right does not, without a specific grant, also encompass either actual title to the gas estate or the right to produce it for commercial purposes." 898 P.2d at 689. In further considering the correlative rights of the coal owner and the gas owner, the Court found "the owner of the gas estate can also safely extract and produce coal seam methane gas either in advance of or during coal mining operations." 898 P.2d at 689.

The Montana Supreme Court thus held that the owner of the gas estate is entitled to drill and produce gas wells into coal formations, while the Alabama and Pennsylvania Supreme Courts concluded that coal operators may

produce CBM as a by-product of coal mining operations. The Alabama and Pennsylvania courts prohibit the coal miners from producing CBM if it is not contained in coal or if it migrates into other formations. The Tenth Circuit *en banc* overgeneralized the holdings of these cases and mistakenly concluded that "the majority of other states addressing the issue have also held that ownership of CBM is in the coal owner." 151 F.3d at 1262.

The Tenth Circuit's panel opinion dismissed these cases as irrelevant:

> The Tribe, the Amoco defendant, and the federal defendants have cited state court cases which have considered ownership of CBM. As interesting as these cases are . . . they are not dispositive in the case at bar. The state cases construe CBM ownership in the context of common law deeds, which are negotiated conveyances with specific rules and presumptions of construction. These cases ultimately have little to offer in terms of our interpretation of Congressional intent in the 1909 and 1910 Acts.

119 F.3d at 836, n.17. Justice Tracha's dissent also finds that these "state cases present different inquiries and different rules of construction than those at work in this case. Thus, as the panel said the first time around, they have extremely limited value here." 151 F.3d at 1275, n.3.

The Tenth Circuit misunderstands these cases. They are relevant not for their rules of construction of deeds between private parties, but for their analysis of the law of capture and the correlative rights of owners of separate mineral estates. Even if a wild animal is on your property, you do not own it until you reduce it to possession. Similarly, if gas is contained in your coal, you do not own it until you bring it to the surface. The Tenth Circuit recognizes that the CBM captured by Amoco is gas as it is produced at the surface. The Tenth Circuit should have considered whether Amoco violated any of the correlative rights of the coal owners in producing the gas. The fol-

lowing questions were raised by Amoco's operation and never considered by the Tenth Circuit:

1. Was the CBM contained in the coal when Amoco's wells were drilled?
2. Did the CBM originate in the coal or did it migrate into the coal?
3. Did Amoco damage the coal estate by producing the gas? If so, how much did this damage reduce the value of the coal estate and by how much?
4. Does the coal estate have any commercial value, or is the entire value attributed to the CBM? If the Tribe has no interest in mining the coal, is it entitled to drill gas wells to produce the CBM?
5. Does CBM within the Fruitland Coal flow naturally to Amoco's wells or is stimulation required? What is the nature of the stimulation that is required?
6. Is the CBM commingled with non-CBM gas when it is produced from Amoco's wells? If there is commingling, can the CBM be distinguished from the non-CBM gas and metered at the surface?

These questions can be resolved only by looking at contemporary scientific evidence. The Tenth Circuit held that such technical evidence was irrelevant. It limited its inquiry to the scientific evidence available in 1909 and the popular understanding of gas and coal in 1909. In putting on these blinders, the Tenth Circuit formulated a concept alien to oil-and-gas jurisprudence: ownership in the formation. Possession is no longer required in determining ownership of wild animals; ownership is determined by proving where the wild animals were born. Similarly, under the Tenth Circuit's novel theory, ownership of minerals *ferae naturae* is determined by looking at the minerals in their subsurface formation.

The Tenth Circuit's analysis is fatally incomplete. It is inconsistent with common law principles that are the

foundation of oil-and-gas jurisprudence. All land titles in the oil-and-gas producing states are founded on the law of capture and correlative rights. NARO respectfully asks this Court to grant the petition for certiorari and apply these principles to the land titles in this case.

III. THE TENTH CIRCUIT VIOLATED *CHEVRON* BY REFUSING TO RELY ON INTERIOR'S RULES AND REGULATIONS

The Tenth Circuit decided ownership of CBM by applying the following statutory analysis: (1) It looked to the plain meaning of the Acts of 1909 and 1910 and found them ambiguous as to the ownership of CBM, (2) It looked to the specific intent of Congress in enacting these Acts and found that the specific intent was ambiguous, (3) It looked to the general intent of Congress and the historical context behind the Acts and found that the general intent was ambiguous, and (4) on cross-motions for summary judgment it applied a rule of construction of last resort and held that all ambiguities in land grants must be construed in favor of the sovereign.

In finding all these ambiguities, the Tenth Circuit gave no weight to the voice of the sovereign as expressed by the Secretary of the Interior in rules and regulations for managing the government's coal and gas estates. In his 1981 Opinion, the Solicitor concluded that CBM is "both scientifically defined and legally regarded as a gas." See Amoco's petition for cert., App. 143a. The Solicitor further concluded that a coal lease does not include the right to extract CBM and that producers must obtain oil and gas leases from the Department of Interior before they are entitled to prouce CBM. App. 155a-156a.

The Tenth Circuit held that the Solicitor's Opinion was not entitled to deference under *Chevron* or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and that it was arbitrary and capricious. The Solicitor's Opinion was defective, according to the Tenth Circuit, because it considered

the state law cases on CBM. 119 F.3d at 835. As NARO argued in the preceding section, these cases properly looked to the common-law principles of the law of capture and correlative rights. The Tenth Circuit was arbitrary and capricious in failing to apply these common-law principles.

The Tenth Circuit also dismissed the Solicitor's Opinion because it was neither a legislature rule nor an adjudication. The Tenth Circuit ignored an adjudication in the record below that concluded that the gas owner, and not the United States as the owner of coal reserved under the Coal Land Acts, was entitled to produce CBM from coal formations. *Amoco Production Co.*, GS-181-O&G (U.S.G.S. July 22, 1981). Tribe's App. at 2062.

The Tenth Circuit cited the following cases in support of its conclusion that mineral reservations must be construed expansively in favor of the sovereign: *Watt v. Western Nuclear*, 462 U.S. 36; *Aulston v. United States*, 915 F.2d 584 (10th Cir. 1990); and *Brennan v. Udall*, 379 F.2d 803 (10th Cir. 1967). Incredibly, each of these cases deferred to an agency interpretation. This Court found in *Western Nuclear*: "It is also highly pertinent that federal administrative and judicial decisions over the past half-century have consistently recognized that gravel deposits could be located under the general mining laws. . . ." 462 U.S. at 57. In *Brennan*, the 10th Cir. cuit held:

> Although the position of the Department of the Interior has varied over the years . . ., it has consistently construed the 1914 Act to authorize the classification of lands containing oil shale deposits as a valuable source of petroleum and nitrogen and to require the reservation of such deposits when patents are issued.

379 F.2d at 806. The Tenth Circuit in *Aulston* deferred to the Department of Interior's interpretation of a 1914 act to include carbon dioxide in the Act's reservation of gas. 915 F.2d at 595.

Besides dismissing the Solicitor's Opinion, the Tenth Circuit ignored regulations adopted over the past century by the Department of Interior in separately administering the coal, gas and mineral estates reserved by the federal government under the Coal Land Acts of 1909 and 1910 and other land acts. Interior's regulations divide hydrocarbon minerals into three categorics based on their physical properties: (1) nongaseous solids, which include coal and solid minerals other than coal, (2) oil, which is defined as all nongaseous fluid hydrocarbons, including condensates that may be in a gaseous state under reservoir conditions but condense into liquid form at atmospheric conditions, and (3) gas, which is defined as all substances, combustible or noncomubustible, that are gaseous at atmospheric conditions. Interior thus defines gas, oil and coal as mutually exclusive substances and mutually exclusive property rights. *See* 43 C.F.R. § 3400, et seq., Coal Management; 43 C.F.R. § 3500, et seq., Management of Solid Minerals Other Than Coal; and 43 C.F.R. § 3100, et seq., Oil and Gas Leasing.

Interior regulations also provide that if a substance contained in a coal reservoir, such as methane, can be produced in a natural and gaseous state from the earth, it is defined as gas and belongs to the owner of the gas estate:

> Gas: means any fluid, either combustible or noncombustible, which is produced in a natural state from the earth and which maintains a gaseous or rarefied state at ordinary temperatures and pressure conditions.

43 C.F.R. § 3000.0-5(a). *See also* 30 C.F.R. § 206.171 (Indian gas).

The Tenth Circuit's opinion cannot be reconciled with the rules, regulations and adjudications of the Department of Interior. The Tenth Circuit has substituted its opinion for the determinations made by Interior in administering the coal rights reserved by the United States under the Coal Land Acts.

Amoco forcefully argued in its petition for certiorari that the Solicitor's Opinion was entitled to *Chevron* deference and that certiorari should be granted to resolve a split in the circuit courts on this issue. NARO further submits that the Tenth Circuit should have deferred to the rules and regulations concerning CBM adopted by the Department of Interior over the past century. Similar rules and regulations were deferred to by this Court in *Western Nuclear* and by the Tenth Circuit in *Brennan* and *Aulston*.

CONCLUSION

The Tenth Circuit has ignored fundamental principles of oil-and-gas law in determining ownership of CBM. These common-law principles are the foundation upon which mineral titles are based in all oil-and-gas producing states. Further, the Tenth Circuit has ignored rules, regulations and adjudications of the Department of Interior in administering oil, gas and coal reserved by the United States. The Tenth Circuit has divested hundreds of thousands of royalty owners of gas rights that were patented to their ancestors. NARO respectfully requests that this Court grant certiorari to determine ownership of this important energy resource.

Respectfully submitted,

DONALD F. HEATH, JR.*
ROBIN STEAD
STEAD & HEATH, P.C.
100 N. Broadway Ave., Suite 2270
Oklahoma City, Oklahoma 73102
(405) 232-1148

Attorneys for the National Association of Royalty Owners, Inc., *amicus curiae*

* Counsel of Record